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Supreme Court of the United States

October Term, 1957

DISTRICT LODGE 34, LODGE 804, INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., ET AL.,

Petitioners,

vs.

L. P. CAVETT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BROWN & GETTLER
J. W. Brown
Ben Gettler
Jonas B. Katz
1505 Fountain Square Building
Cincinnati 2, Ohio
PLATO E. PAPPS
1300 Connecticut Avenue
Washington 6, D. C.
Attorneys for Petitioners

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District Lodge 34, Lodge 804, International Association of Machinists, AFL-CIO, International Association of Machinists and William C. Smith, John Ernst, Vincent Dalton, Dan McLaughlin, Martin Ernst, and Edgar Patrick, individually and as agents of said District Lodge 34, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on June 19, 1957.

OPINIONS BELOW

The Court of Common Pleas of Hamilton County, Ohio, rendered no separate opinion in this cause. Its finding in regard to the jurisdictional question herein raised is contained in the Entry Granting Permanent Injunction which is reprinted in the Appendix hereto (Appendix, p. 12) and is unreported.

The opinion of the Court of Appeals of Hamilton County, Ohio, is reported in 136 N.E. 2d 276 and is reprinted in the Appendix hereto (Appendix, pp. 13-18).

The Supreme Court of Ohio rendered no opinion. Its Order overruling the Motion to Certify the Record and granting Motion to Dismiss Appeal entered June 19, 1957, is reprinted in the Appendix hereto (Appendix, pp. 18-19).

JURISDICTION

The judgment and order of the Supreme Court of Ohio was entered June 19, 1957. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

1. May a state court enjoin peaceful picketing of an interstate employer for the purpose of giving what it deems to be the proper effect to a National Labor Relations Board representation proceedings?

2. May a state court enjoin peaceful picketing of an interstate employer for the reason that the picketing union has lost a National Labor Relations Board representation election?

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), provide as follows:

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employee, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF THE CASE

In March, 1955, the petitioner-union filed with the National Labor Relations Board a Petition for Certification of Representatives pursuant to Section 9 (c) of the Labor Management Relations Act seeking certification for a group of garage employees of the respondent-employer (Company Exhibit 1, Rp 139). In accordance with Board procedure, the union and the employer entered into a "Stipulation for Certification Upon Consent Election" (Co. Ex. 2, R. p. 140) under the auspices, and with the approval, of the Regional Director of the Ninth Region of the Board.

Contained in the aforementioned Stipulation was the following:

> The employer is engaged in commerce within the meaning of Section 2 (6) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9 (c).
>
> The employer is an Ohio corporation with principal office and place of business in Lockland, Ohio. The employer is engaged in the business of road construction in a number of states in the United States and performs services valued in excess of $100,000.00 outside the State of Ohio.

In accordance with the Stipulation, an election was conducted among the 7 garage employees of the respondent

which election resulted in 4 votes being tallied against the union and 3 for the union. The results of this election were duly certified by the Regional Director of the National Labor Relations Board (Co. Ex. 3–R. p. 141).

On or about April 26, 1955 a *majority* of the same 7 garage employees (to-wit, 4: petitioners John Ernst, Martin Ernst, McLaughlin, and Patrick) voted to and did engage in a strike and picketing of the employer's premises.[1] The purpose of said picketing, as found by the court below, was to obtain recognition and a collective-bargaining agreement.[2]

The respondent at no time filed any unfair labor practice charges relative to the aforementioned picketing.

Proceedings in Common Pleas Court

On or about April 27, 1955 the respondent filed a petition (R.p. 10) in the Common Pleas Court of Hamilton County seeking to enjoin the aforementioned picketing. The petition alleged in substance that the respondent and the petitioners had entered into an election agreement under the auspices of the National Labor Relations Board for the purpose of determining a bargaining representative; that the union lost the election but notwithstanding that loss it had demanded that the respondent enter into a collective-bargaining agreement; that the respondent refused to accede to this demand; and that the petitioner commenced picketing.

---

[1] One can only surmise that the results of the election were affected by the mistaken marking of one ballot by an employee.

[2] The petitioners contended below that the picketing was in protest of what they considered to be a reprisal discharge of one of the union employees. The state court, however, found the purpose to be as set forth above, and petitioners, accordingly, are in this petition assuming the correctness of that finding.

An *ex parte* temporary restraining order was issued on April 26. Immediately thereafter a Demurrer challenging the court's jurisdiction was filed (R. p. 16-22) and was subsequently overruled. The parties thereafter presented evidence to dissolve the restraining order at the conclusion of which the court permitted the restraining order to remain in effect. An answer to the petition was filed, and the evidence previously presented with certain additional stipulations constituted the evidence on trial herein.

The Common Pleas Court thereupon entered a permanent injunction enjoining the picketing on March 27, 1956 (R. p. 6, 7). In answer to the challenge of jurisdiction, the court held that the aforementioned "Stipulation for Election Upon Consent Agreement" was a "contract" which state courts had jurisdiction to enforce (App. p. 12).

Proceedings in Court of Appeals

Timely appeal *de novo* was taken to the Court of Appeals of Hamilton County which court affirmed the order of the lower court and an entry granting the injunction as previously granted in the Common Pleas Court was entered by the Court of Appeals on October 23, 1956.

The opinion of the Court of Appeals (App. pp. 13-15) disregarded the "contract" theory but found that the Certification of Results of the election constituted "a judgment and order" of the National Labor Relations Board and that the defendants "ignored such judgment and refused to comply with the order of the Board." The court concluded *inter alia*:

1. A state court of equity may use its power of injunction to enforce "an order of the National Labor Relations Board."

2. State courts are not helpless to protect the plaintiff from a willful refusal of the defendants to abide by the "judgment of the Board."

3. The defendants cannot force the plaintiff over and over again to submit the judgment of the Board adverse to the union to be repeatedly adjudicated.

The Court of Appeals therefore concluded:

"Until Congress has definitely held that state courts are completely ousted from any jurisdiction to grant any relief in equity from such a flagrant situation, as here exists, the state courts, after original submission of the parties to the National Labor Relations Board, have the power to protect such parties from irreparable loss, for which no other adequate remedy at law exists."

Proceedings in Supreme Court of Ohio

An appeal from the order of the Court of Appeals was taken to the Supreme Court of Ohio on a Motion to Certify the Record and an Appeal as of Right. The respondent filed a cross-Motion to Dismiss the Appeal as of Right. On June 19, 1957, without opinion, the Supreme Court of Ohio granted respondent's Motion to Dismiss the Appeal as of right and overruled petitioner's Motion to Certify the Record. The court stated that it was dismissing the Appeal "For the reason that no debatable constitutional question is involved in said cause." (App. p. 19)

It is to review this final order that this petition is submitted.

THE FEDERAL QUESTION WAS RAISED AND PRESENTED

The federal question herein sought to be reviewed was raised by the petitioners with its initial pleading, a Demurrer challenging the jurisdiction of the court (R. p. 16). The question was again raised by the Answer in the way

of a special defense (R. p. 26). The Common Pleas Court passed on the jurisdictional question in its Entry Granting Permanent Injunction (App. p. 12).

The instant question was again raised in the appeal to the Court of Appeals in petitioners' Assignment of Errors and was specifically passed upon by that court as previously quoted (App. pp. 13-15). In the Supreme Court of Ohio the question was presented and argued in the Brief of Appellants In Support Of Appeal As Of Right And Motion To Certify and also in the Reply Brief. (R. p. 169-226).

REASONS FOR GRANTING THE WRIT

A. The foregoing facts readily reveal that the decision of the Ohio court is in direct conflict with the decisions of this court in *Garner et al.* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch, Inc.* (1955), 348 U.S. 593; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656; *Arkansas Oak Floor* v. *United Mine Workers*, 351 U.S. 62; *P. S. Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20; *San Diego Building Trades Council* v. *Garmon*, 353 U.S. 26. The Ohio court, in constituting itself a forum for deciding facts and effectuating remedies in matters arising out of a certification proceedings under the Labor Management Relations Act, 1947, has asserted jurisdiction in an area which is within the exclusive province of the National Labor Relations Board. *Weber* and *Arkansas Oak* make it clear that the preemption doctrine is not diminished merely because the union fails to be certified under Section 9 (c) of the Act.

In *Fairlawn Meats, supra*, this court found it necessary to reverse the Supreme Court of Ohio when that court enjoined minority picketing for recognition of an employer over which the National Labor Relations Board had jur-

isdiction but had refused to exercise that jurisdiction. Here again, and in spite of the decision in the *Fairlawn* case, the Ohio court acted in a recognition-picketing case in which the Board not only had exclusive jurisdiction but had exercised that jurisdiction. Certainly, if a state court cannot act in a case in which the Board has jurisdiction but refuses to exercise it, *a fortiori* a state court cannot act in a similar case in which the Board has exercised its jurisdiction.

The Ohio court did recognize the jurisdiction of the Board but fashioned what it considered to be a judgment in aid of the federal agency's proceedings. It is significant to note, however, that the result reached by the Ohio court in enjoining the picketing is contrary to that which would have been reached by the National Labor Relations Board Administrative Ruling of NLRB General Counsel, Case No. 1133, 35 LRRM 1533 (1955). Unlike *Garner* and *Weber*, petitioners believe that the activity enjoyed by this Ohio court is "protected" under Section 7 of the Federal Act.[8] Thus, this case more closely resembles *United Automobile Workers* v. *O'Brien*, 339 U.S. 454. In any event, however, it is apparent that the attitude of the Ohio court toward this labor controversy and the procedures used to implement such attitude have produced incompatible and conflicting adjudications at variance with the clear intent of the Labor Management Relations Act. cf. *Garner* v. *Teamsters Union*, *supra*.

B. The only argument asserted below in support of the state jurisdiction was that the National Labor Relations Board "Stipulation for Election Upon Consent Agreement" entered into by the parties is a "contract" which

[8] *UMW* v. *Arkansas Oak Flooring*, *supra*. Ecko Products Inc., 1957, 117 NLRB No. 31.

state courts have jurisdiction to enforce.[9] This argument is disposed of summarily:

1. The said Stipulation refers only to the details of the election and contains no agreement which binds the union not to engage in picketing for recognition. Indeed, such an interpretation would be contrary to the express language of Section 13 of the Act.

2. Assuming arguendo that the Stipulation created a private "contractual right", this court has repeatedly held that state courts do not acquire jurisdiction merely because of the application of some doctrine of private right. In this connection, the instant case is similar to *Retail Clerks International Association et al. v. J. J. Newberry Co.*, 352 U.S. 987, wherein the union withdrew from an executed NLRB Election Agreement similar to the instant one after it became convinced it would not win an election, and thereafter commenced picketing.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

BROWN & GETTLER
J. W. Brown
Ben Gettler
Jonas B. Katz
1505 Fountain Square Building
Cincinnati 2, Ohio
PLATO E. PAPPS
1300 Connecticut Avenue
Washington 6, D. C.
Attorneys for Petitioners

[9] In support of this argument, respondent cited *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437. This case is inapposite since it deals with a suit for damages, the primary issue therein dealing with Section 301 of the Act.

APPENDIX IX

ORDER FOR PERMANENT INJUNCTION

Mar. 27 (Jan Ter) Order for permanent injunction. Min. 2243. This cause came on to be heard upon plaintiff's petition and applicaton for permanent injunction and upon the answer, as amended, of the defendants District Lodge 34, Lodge 804, International Association of Machinists, A. F. L., William C. Smith, John Ernst, Vincent Dalton, Dan McLaughlin, Martin Ernst and Edgar Patrick, and upon the record and transcript of evidence stipulated by the parties hereto and upon the argument of counsel and has been considered by the court; whereupon the court finds that this cause is an action based on breach of contract, to wit, breach of a consent election agreement, and the court has jurisdiction of the subject matter of this cause; and that plaintiff's petition for a permanent injunction is well taken and should be granted against all of the defendants and all persons represented by them or acting for on or in concert with them, and each of them.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's petition for a permanent injunction be, and it hereby is, granted; and that the defendants and all persons represented by them or acting for or in concert with them, and each of them, be, and they hereby are permanently restrained and enjoined from all picketing, bannering, and interference with the operations of plaintiff, and from any and all efforts, attempts, conspiracies, combinations, confederations and agreements, all for the purpose of threatening, intimidating, or harassing plaintiff into entering into a collective bargaining contract with the defendant unions or hiring the defendant

John Ernst. Defendants include all of the parties mentioned in the caption of the petition in this cause.

The plaintiff shall recover from defendants its costs herein expended. Bond Five Hundred Dollars ($500.00). To all of which defendants except.

/s/ CARSON HOY
Judge

Have seen:
/s/ J. W. BROWN
/s/ JONAS B. KATZ
Attorneys for Defendants

TAFT, STETTINIUS & HOLLISTER
By /s/ J. MACK SWIGERT
CHARLES D. LINDBERG
Attorneys for Plaintiff

OPINON OF THE COURT OF APPEALS

PER CURIAM.

The simple question here presented is whether, after the plaintiff has complied with all procedure required to determine the respective rights of the plaintiff and the rights of the defendants before the National Labor Relations Board, and the Board has, after an election ordered by it, duly held, rendered judgment adversely to the defendants, holding they have no authority to act as the bargaining agent in the premises, that the defendant, ignoring such judgment, may demand of the plaintiff that they be considered as such bargaining agent, and, upon refusal of plaintiff, in compliance with the order of the Board, may lawfully picket the business of plaintiff?

This question involves a corollary question—is the jurisdiction of the state courts completely abrogated, so that

such courts may not by the power of injunction protect the plaintiff from the refusal of the defendants to acknowledge the order of the National Labor Relations Board.

There is no dispute between the plaintiff and its employees which has not been adjudicated by the National Labor Relations Board. Can it be that the State Courts are helpless to protect the plaintiff from the wilful refusal of the defendants to abide by the judgment of the Board, especially after agreement to submit such matter to the Board.

Grimes & Hauer, Inc. v. Pollack, et al., 163 Ohio St., 372, has no application to the instant facts. In that case, the employer resorted to the state courts before having his dispute with the Union adjudicated by the Board.

If the defendants may ignore, once, the judgment of the board, they could ignore it a dozen or more times, forcing the plaintiff over and over again to submit a judgment, adverse to the union, to be repeatedly adjudicated. Such could not have been the intention of Congress in enacting the National Labor Relations Act.

Until Congress has definitely held that State Courts are completely ousted from any jurisdiction to grant any relief in equity from such a flagrant situation, as here exists, the State courts, after original submission of the parties to the National Labor Relations Board, have the power to protect such parties from irreparable loss, for which no other adequate remedy at law exists. Some attempt is made by the defendants to predicate this repeated demand for recognition as the bargaining agent, on the discharge of one of plaintiff's employees. This was made the basis of a complaint to the National Labor Relations Board and the adjudication of the Board was adverse to the defendants. So that it is apparent that the claims of the defendants are predicated upon the same basis as that previously adjudicated against them by the National Labor Relations Board.

No actual labor dispute exists. Picketing, under such circumstances, is an invasion of the rights of the employees not to participate in union activity, and of the plaintiff's right to operate its business without wrongful interference, which would, and does violate the public policy of the State.

The same decree as that entered in the trial court, permanently enjoining interference with the plaintiff's business by defendants, may be entered as the decree of this Court.

ROSS, P. J., & HILDEBRANT, J., CONCUR
MATTHEWS, J., CONCURS IN SEPARATE MEMORANDUM

MATTHEWS, J., (Concurring)

I cannot agree that this case presents either the "simple question" or the "corollary question" propounded in the first two paragraphs of the opinion of my associates.

The undisputed facts are that the plaintiff is a corporation and was at the time in question engaged in interstate commerce, and that the defendant District Lodge 34, Lodge 804, International Association of Machinists, A.F.L., on or about February 14th, 1955 filed with the National Labor Relations Board a petition for an election to determine the representation of certain of its employees who were engaged in interstate commerce, and on March 23rd, 1955 a stipulation was signed and filed with the Board agreeing to the election and expressly waiving the making of findings of fact and conclusions of law prior to the election, which would have been required in the absence of such stipulation. The plaintiff alleged that the defendant Union by signing the stipulation agreed to abide by the results of such election. While, without doubt, it would have been bound by the election, whether conducted with

or without stipulation. I find no provision of the stipulation upon which to found a contractual obligation to be bound by the result.

On March 31st, 1955, the election was held and a majority of the employees voted against having the defendant Union as their representative in collective bargaining. The Union filed no objection to the election, and on April 8th, 1955, the National Labor Relations Board certified the result of the elections to the parties.

Thereafter, on April 26th, 1955, the defendant Union demanded that the plaintiff immediately enter into a collective bargaining agreement with it on behalf of the plaintiff's employees, and also that the plaintiff re-employ the defendant, John Ernst, a member of defendant Union whom the plaintiff had discharged because, as it claimed, for dishonesty, and, as claimed by defendants, because of union activities. The defendant Union notified the plaintiff that if it did not comply at once, its place of business would be picketed.

The plaintiff refused the demand and on April 27th, 1955, the defendants caused the plaintiff's place of business to be picketed. Thereafter, on the same day, this action was filed to enjoin the picketing, and a temporary restraining order was granted. And, on the next day, the defendant, John Ernst, filed with the National Labor Relations Board his complaint against the plaintiff, alleging that his discharge was an unfair labor practice, in that it was because of his activities on behalf of the defendant Union.

On August 8th, 1955, the Regional Director notified the parties that it did not appear that there was sufficient evidence of violation to warrant further proceedings at that time, and, for that reason, he was refusing to issue a complaint.

The picketing, prior to the temporary restraining order, was not accompanied by any violence or disorder, and, of course, there has been no picketing since.

Counsel for the plaintiff seems to base his right to an injunction on the stipulation signed by the parties consenting to the election. He interprets that stipulation to be an agreement to abide by the result of the election. As already noted, I do not so construe the stipulation and for that reason do not regard the case of *General Electric Co.* v. *Union*, 93 Ohio App., 139, as applicable.

Upon first consideration of this case, my conclusion was that *Grimes & Hauer, Inc.* v. *Pollock*, 163 Ohio St., 372, and *Garner* v. *Union*, 346 U. S. 485, were applicable and required a reversal of this judgment, but, on June 4th, 1956, the Supreme Court of the United States decided the case of *United Automobile, etc. Workers of America* v. *Wisconsin Employment Relations Board, and Kohler Co.*, reported in United States Law Weekly Bulletin of June 5th, 1956, which causes me to revise my conclusion.

In the *Wisconsin case* the picketing, which was enjoined, was apparently aggravated by some violence. In any event it was an unfair labor practice under both the National Labor Relations Act and the Wisconsin Employment Peace Act. The Supreme Court of the United States sustained the judgment of the Wisconsin Court enjoining the picketing. In the opinion, concurred in by six of the Justices, it is said: "As a general matter we have held that a state may not, in the furtherance of its public policy, enjoin 'conduct which has been made an 'unfair labor practice' under the federal statutes' * * * * but our past Taft-Hartley opinions have made it clear that this general rule does not take from the states power to prevent mass picketing, violence and overt threats of violence".

In view of this more recent decision of the Supreme Court of the United States, I am of the opinion that the fact that the acts enjoined come within the category of unfair labor practices, as defined by Section 8 of the Labor Management Relations Act, does not render it void as beyond the jurisdiction of the state court. In this connection, I call attention to the fact that the provision in Section 8, making picketing of all sorts to compel an employer to designate a particular union as the bargaining agent, an unfair labor practice is in harmony with the Ohio rule making peaceful picketing to compel unionization, when no dispute exists between the employer and his employees, unlawful.

For these reasons, I concur with my associates that the same decree as was entered in the trial court should be entered in this court.

Filed, February 20, 1957, Supreme Court of Ohio.

SUPREME COURT OF OHIO

ORDER ON MOTION TO DISMISS APPEAL AS OF RIGHT

It is ordered by the Court that this motion be, and the same hereby is, sustained.

J. 42 - P. 344

Entered June 19, 1957.

SUPREME COURT OF OHIO

ORDER ON APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, upon the motion of the appellee to dismiss the appeal filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $.....

ORDERED, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into Execution.

J. 42 - P. 350

Entered June 19, 1957